

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 488 OF 1988

1. Sunanda d/o.Jayawant Dhanawade
representing himself as Sunanda
w/o. Jinnappa Khot.
2. Rajaram mother Sunanda Dhanawade.
3. Mina mother Sunanda Dhanawade.
4. Shaila mother Sunanda Dhanawade.
5. Shobha mother Sunanda Dhanawade.
6. Varsha mother Sunanda Dhanawade.
7. Nutan mother Sunanda Dhanawade.

... Appellants.
(org.Defendants Nos.2 to 8)

Versus.

1. Putalabai w/o.Jinnappa Rama Khot.
2. Dinkarrao Anandrao Ghorpade

... Respondents.
(Org.Plaintiff & Deft.No.1)

Shri V.S.Gokhale for the Appellants.

Shri V.B.Naik for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 18th March, 2005.

ORAL JUDGMENT.

1. This Appeal was heard on 16th March 2005 and was
adjourned for judgment. On 30th November 1988 the
Second Appeal was admitted by passing the following
order:

"Mr.Apte is heard. S.A. admitted - the
substantial question of law being whether

appellants were wrongly held to be excluded from the right to redeem whether along with Respondent No.1 or to her exclusion."

I have heard the learned Counsel appearing for the parties on the substantial question of law as reflected in the said order.

2. The Appeal is preferred by the original Defendant Nos.2 to 8. Respondent No.1 is the original Plaintiff and the Respondent No.2 is the original Defendant No.1. The case of the Respondent No.1 is that she is the wife of one Jinnappa Rama Khot. The case of the Respondent No.1/Plaintiff is that the said Jinnappa mortgaged the suit property in favour of the Respondent No.2/Defendant No.1 by a deed of mortgage by conditional sale dated 15th April 1971. According to the terms of the deed of mortgage the same was to be redeemed on or before 15th April 1976. It was agreed between the parties that after the period prescribed in the agreement was over, the account was to be settled between the said Jinnappa and the Respondent No.2 and it was agreed that the Respondent No.2 will deliver possession to Jinnappa on receiving Rs.1500/- from Jinnappa. As the Respondent No.2 refused to hand over possession to the Respondent No.1, the suit was filed for redemption of the mortgage.

The said Jinnappa died on 21st May 1973.

3. The suit was contested by the Respondent No.2 by filing Written Statement. The main contention raised by the Respondent No.2 was that the transaction was not a mortgage but it was an absolute sale. It was his contention that the stipulation of reconveyance was incorporated in the agreement which was not to be acted upon.

4. The Appellant No.2 to 8 (the Defendants Nos.2 to 8) resisted the suit by filing written statement. The contention raised in the written statement was that the Respondent No.1/Plaintiff was not the legally wedded wife of deceased Jinnappa and if Jinnappa had any relation with her it was severed long before his death. Another contention raised was that the suit property was jointly owned by Jinnappa and the Defendant No.2. It is contended that the Appellant No.2 acquired title to the suit property after the demise of Jinnappa.

5. The learned trial Judge decreed the suit. The learned trial Judge held that the Respondent No.1/Plaintiff is the legally wedded wife of the deceased Jinnappa and was the only legal representative of Jinnappa. It was held that the transaction between the Respondents Nos.1 and 2 was mortgage by conditional sale. The trial Court came to the conclusion that the

Appellant No.1 i.e. Defendant No.2 failed to prove that she was married to the deceased Jinnappa and that the Appellants Nos.2 to 8 are the sons and daughters of deceased Jinnappa. The learned trial Judge also held that the Appellant No.2 has failed to prove that the deceased Jinnappa had divorced the Respondent No.1.

6. The decree passed by the trial Court was not challenged by the Respondent No.2 mortgagee but the present Appellants challenged the decree by preferring an appeal to the District Court. The learned 3rd Additional District Judge held that the Respondent No.1 proved that she was legally wedded wife of the deceased Jinnappa and was the sole legal representative of the deceased Jinnappa. The learned Additional District Judge also held that the Appellants have failed to prove that the Appellant No.2 was the wife of deceased Jinnappa and that the Appellants Nos.3 to 8 were the children born to the Appellant No.2 from deceased Jinnappa.

7. The Appellate Court held that the Appellant No.2 is Christian by religion as her parents were Christians since birth. The Appellate Court held that the Appellants Nos.3 to 8 regularly attended Church and were brought up by the Appellant No.2 and therefore by virtue of section 2 of the Hindu Marriage Act, 1955 the

Appellants Nos.3 to 8 cannot be treated as Hindus and therefore, even assuming that the Appellants Nos.3 to 8 were illegitimate children of the deceased Jinnappa, they will not be entitled to inherit any share in the property of deceased Jinnappa by invoking section 16 of the said Act of 1955.

8. Shri Gokhale appearing for the Appellants submitted that by virtue of section 16 of the said Act of 1955 the Appellants Nos.3 to 8 will be the legal representatives of the deceased Jinnappa even assuming that the marriage between the deceased Jinnappa and the Appellant No.2 was not valid. Shri Gokhale further submitted that the deed of mortgage was also signed by the Appellant No.2 and therefore, the suit property was a joint property of deceased Jinnappa and the Appellant No.2.

9. The learned Counsel appearing for the Respondent No.1 Shri V.B.Naik pointed out various findings recorded by the Courts below and submitted that no substantial question of law arises in the Second Appeal and the same deserves to be dismissed.

10. I have considered the rival submissions. The Courts below have recorded concurrent findings that there was a valid marriage between the Respondent No.1 and the deceased Jinnappa. The Appellate Court has

noted that though initially the Appellants denied that the Respondent No.1 was the wife of the deceased Jinnappa in the further pleadings it was contended by them that the Respondent No.1/Plaintiff was not residing with the deceased Jinnappa and she had obtained divorce as per the religious custom. The other defence taken is that the relationship between the Respondent No.1 and the deceased Jinnappa was severed long back. The Appellate Court has recorded a finding that there was no divorce between the Respondent No.1 and the deceased Jinnappa. The very fact that the Appellants contended that there was a divorce as per the custom between the Respondent No.1 and the deceased Jinnappa itself shows that the Appellants accepted that there was a valid marriage between the Respondent No.1 and the deceased Jinnappa. Therefore, no fault can be found with the findings recorded by the Courts below that the Respondent No.1 established that she was legally wedded wife of the deceased Jinnappa.

11. It appears from the findings recorded by the Appellate Court in paragraph 11 of its Judgment that after the demise of Jinnappa the proceedings were initiated before the City Survey Officer for mutating the names of legal representatives of the deceased Jinnappa. In the said proceedings the Appellant No.1 gave a statement that the Respondent No.1 was the legal

representative of the deceased Jinnappa being his wife. The Appellant No.1 was confronted with the said statement in her cross-examination and she admitted to have signed such a statement. Therefore, the Appellate Court has held that the Appellant No.1 herself accepted that the Respondent No.1 was wife of Jinnappa. There are other material documents on record considered by the Courts below for holding that the Respondent No.1 was wife of Jinnappa. It is thus obvious that when the Appellant No.1 has not come out with the case that her marriage with the Jinnappa was prior in point of time, she cannot claim that her marriage with Jinnappa was valid, assuming that there was such a marriage. It is not in dispute between the parties that the deceased Jinnappa was Jain by religion. The Appellant No.1 is a Christian by religion. It is also borne out from the record and from the findings of the Courts below that the Appellants Nos.2 to 7 always stayed with the Appellant No.1 and they attend the Church regularly for offering prayers. Even assuming that the Appellants Nos.2 to 7 are the sons and daughters of the deceased Jinnappa the question is whether section 16 of the said Act of 1955 will apply to the Appellant Nos.2 to 7 for claiming that they have right to succeed to the property of Jinnappa. Section 2(1) of the said Act of 1955 is material to note:

"2(1) This Act applies -

- (a) To any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, A Lingayat or a follower of the Bhahmo, Prarthana or Arya Samaj.
- (b) to any person who is Buddhist, Jain or Sikh by religion, and
- (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parashi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation:- The following persons are Hindus, Buddhists, Jains or Sikhas by religion, as the case may be :-

- (a) any child legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or

Sikhs by religion; (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhists, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group of family to which such parent belongs or belonged and (c) any person who is a convert or reconvert to the Hindu, Buddhist, Jain or Sikh religion."

Explanation to section 2 sub-section (1) provides that any child whether legitimate or illegitimate one of whose parents is a Hindu and who is brought up as a member of the community or group of family to which such parent belongs is a Hindu. There is no evidence on record to show that the Appellants Nos.2 to 7 were brought up as members of the Hindu family. In fact all along they have been staying with the Appellant No.1 who is admittedly a Christian. In this view of the matter, the Appellants Nos.2 to 7 not being Hindus cannot claim benefit of section 16 of the said Act of 1955.

12. In paragraph 16 of its Judgment, the Appellate Court has referred to various circumstances on record to show that the deceased Jinnappa asserted that he was the exclusive owner of the suit property. The Appellate Court held that there was nothing on record to show that the Appellant No.1 contributed for purchase of the suit

house. After considering the entire evidence on record, the Appellate Court came to the conclusion that the name of Appellant No.1 must have been mentioned in the document of mortgage as the Appellant No.1 was staying with the deceased Jinnappa at that time. The said finding of the Appellate Court is based on consideration of the evidence on record. In the absence of any independent evidence led by the Appellant No.1 to show that she had contributed for purchase of the said property, only because her name appears along with the deceased Jinnappa in the deed of mortgage is not a ground to hold that Jinnappa was not the exclusive owner and the Appellant No.1 had right, title and interest in respect of the said property.

13. Thus, I find that there is no error in the view taken by the Courts below. There is no merit in the Appeal. The Appeal is dismissed with no order as to costs.

Judge.